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State of Rhode Island and Providence Plantations.

MINORITY REPORT

OF THE

JOINT SPECIAL COMMITTEE ON CONSTITUTIONAL CHANGES,

MADE TO THE

GENERAL ASSEMBLY,

AT ITS

JANUARY SESSION, A. D. 1887.

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REPORT.

The undersigned members of the Joint Special Committee on Constitutional changes, to which was referred a bill for an act recommending the calling of a Constitutional Convention, disagreeing with the majority of said committee, present this separate and dissenting report.

The questions raised by the bill are:

I. Can the General Assembly legally call a Constitutional Convention for the revision of the Constitution?

II. Is it expedient to call a Convention?

On March 30th, 1883, the Supreme Court, in response to questions submitted to it by the Honorable Senate, answered:

"Our Constitution is, by its own express declaration, the supreme law of the State; any law inconsistent with it is void, and, therefore, if the provision which it contains for its own amendment is exclusive, implying a prohibition of amendments in any other manner, then, of course, any act of the Assembly providing for a Convention to amend the Constitution is unconstitutional and void."

The opinion concludes:

"The questions are extremely important, and we should have been glad of an opportunity to give them a more careful study, but under the request of the Senate for our opinion 'without any unnecessary delay,' we have thought it to be our duty to return our opinion as soon as we could, without neglecting other duties, prepare it."

The opinion of the judges has given rise to two important questions:

I. Is the opinion binding on the consciences of the members of the General Assembly? Is it authoritative or merely advisory?

II. Is it correct in law?

The minority of the Committee hold that the opinion is simply advisory, and in no sense a judicial decision. The Constitution, Article X, Section 3, provides:

"The judges of the Supreme Court shall, in all trials, instruct the jury in the law. They shall also give their written opinion upon any question of law whenever requested by the governor or by either house of the General Assembly."

Prof. Thayer, of the Cambridge Law School, who has made an exhaustive study of the subject, concludes his "Memorandum on the Legal Effect of Opinions given by Judges to the Executive and the Legislature under certain American Constitutions," by saying:

"Upon the whole, it seems clear that the opinions herein referred to are purely advisory. There is indeed a popular impression that they are on the same footing as decisions in litigated cases. But if such responses under any of our Constitutions are to hold their place (and it appears that they are useful), it is of grave importance that the notice of their binding quality should be dispelled."

Judge Ames, in Taylor vs. Place, 4 R. I. 324, says of certain matters then before the court for determination:

"This is the first time since the adoption of the Constitution that this question has been brought *judicially* to the attention of the court. The advice or opinion given by the judges of this court, when requested, to the governor or to either house of the Assembly, under the third section of the tenth article of the Constitution, is not a *decision* of this court, and given, as it must be, without the aid which the court derives in adversary cases from able and experienced counsel, though it may afford much light from the reasonings or research displayed in it, can have no weight as a precedent." And as long ago as the time when

the judges were cited before the General Assembly for their decision in the case of Trevett vs Weeden, Judge Howell in his speech before the General Assembly distinctly marked the difference between advisory opinions and decisions of the court.

In "Some Thoughts on the Constitution of Rhode Island," Chief Justice Durfee says: "Judge Bradley *now* distinguishes between a judgment of court and an opinion of the judges. He professes great reverence for the judges when they are deciding cases, but thinks that they are entitled to no more respect than so many lawyers when they are giving an opinion. Doubtless his distinction is not unfounded, but nevertheless I think he pushes it to an extreme. The judges are the Constitutional advisers of the Governor and of the General Assembly; and consequently their opinions, given at the request of the Governor or of either house of the Assembly, have more than an individual authority, being given in their public capacity under the sanction of their official oaths."

The Hon. William P. Sheffield, in "The Mode of Altering the Constitution of Rhode Island," says that "the opinions of the judges without parties before them are not legally obligatory on persons. Judge Bradley need not have gone to the Harvard Law School to get a professor to come to Rhode Island to tell the people, for it is just to them to suppose that they knew that much."

Indeed, the advisory opinions of judges would not be binding upon themselves when the question came before them for judicial determination. See remarks of Judge Story in Mass. Convention, 1820.

The undersigned think that the authorities prove unquestionably that the opinion of the judges, given in response to the questions propounded by the Honorable Senate, is not binding or authoritative, but merely advisory.

The opinion, however, carries with it great moral weight, and justly, too. Its authors are learned and able men skilled in the law, and removed from the heat of party strife, by which their judgment might be

warped. It has been justly said: "The known opinions of the responsible judges of the State will carry with it a moral force, which will be the end of the argument of the question with a large proportion of the law-abiding citizens of this State." It but proves the high esteem in which the judges are held, and compels those who differ with them on this question to labor under great disadvantages. Yet the opinion must be compared with the opinions of men equally able and skilled. The final test, Is the opinion correct? must determine whether it shall stand or fall. In his pamphlet the learned Chief Justice accepts the test, and fairly and fully says: "If the opinion be clearly wrong, I do not ask them (the Assembly) to regard it."

Is the opinion correct in law?

The argument of the judges in their opinion is this: A particular mode of amendment being prescribed, any other mode is prohibited by implication, although no prohibitory language is employed. It is the application of the maxim, "When one way is expressly directed any other is impliedly prohibited." They further say: "If our Constitution had no provision for amendment, then indeed a power in the Assembly to call a Convention or to initiate amendments in some other manner might be implied." That there is no particular method to follow if there be none prescribed. The judges cite the opinion of the Massachusetts Court in support of their argument.

Mr. Jameson, in his work on Constitutional Conventions, says (page 527): "In case a Constitution makes no express provision for amendment in any save the legislative mode, the General Assembly may undoubtedly call a Convention, if there be no clause in the Constitution in negative terms prohibiting it; for it is thoroughly settled that a grant of general legislative authority, alone considered, carries with it the power to call a Convention."

In section 571 of the same work he says: "In respect to the legitimacy of those Conventions, as has been observed, it is now too late to raise a question. They have the sanction of long and general approval,

and were there greater doubt than exists as to their regularity and validity, the necessities out of which they sprung and the evils from which they from time to time rescued our States, would give them strong claims to be recognized as lawful assemblies. More than a century of Constitutional history, indeed, has rendered it clear that it would have been wise in our earlier Constitutions to forestall doubt by expressly providing, as is very commonly done in those framed in our day, that it should be competent for our legislatures to call Conventions not only at times definitely fixed, but whenever it should seem to them advisable so to do."

In the Massachusetts Convention of 1853, which had been called notwithstanding the opinion of the judges of the Supreme Judicial Court, the Hon. Joel Parker, formerly Chief Justice of New Hampshire, said: "I believe this Convention to have been legally assembled. . . . . Is not this mode of amending the Constitution which is prescribed in the Constitution in express terms perfectly consistent with the other mode by a convention of delegates? There is no antagonism between the modes. The people say by their Constitution: 'We will have a convenient mode by which this instrument can be amended, without a Convention, and we will therefore embody a provision that the opinion of two successive legislatures that the Constitution ought to be amended shall be submitted to us for our action, without the expense of a Convention. This is all very well, but does it exclude the idea that a Convention may be holden where there is nothing antagonistic between the two modes? By no means. . . . . I do not understand that there is anything in the terms of this provision of the Constitution that makes it exclusive. . . . . I admit the principle in common law that the designation of one person or one thing in some instances is exclusion of all others, but does that principle apply to this case? That principle applies to all cases where from the necessity or the nature of the case it is shown to be the intent that all other things should be excluded."

In the Massachusetts Constitutional Convention of 1853 were the ablest men of Massachusetts, among whom were Rufus Choate, Henry

Wilson and Judge Marcus Morton, one of the Judges who signed the opinion referred to in the Judges' answers to the questions of the Honorable Senate; none of the above so far as history shows considered for a moment that he was sitting in a revolutionary body.

Nor does it appear that Mr. Webster for a moment thought that the Constitutional Convention of 1853 was illegally convened. His intimate friend, Rufus Choate, then Attorney General of Massachusetts, was a member and took an active part in the proceedings. His biographer, Prof. Brown, says of the Convention, "On the 3d day of July, 1853, the Convention of the delegates of the people of Massachusetts met in Boston, to revise the Constitution of the State. It is doubtful whether an abler body of men ever assembled in the State. . . . The subjects brought into discussion were fundamental to the being and prosperity of States. In this dignified and mighty assembly Mr. Choate spoke on some of the most important questions, and never without commanding the highest respect." Life and Times of Rufus Choate, Vol. 2. p. 187.

There was a question submitted to the Judges of Massachusetts, which is not referred to in the opinion of our Judges, and which seems to us to be decisive of the question so far as that State is concerned.

Second. Whether if the Legislature should call a Convention of delegates for the purpose of making a specific revision of the Constitution in certain departments, that Convention would have any power to go beyond these specific amendments proposed by the terms of the vote calling the Convention?

The Judges answered: If the Legislature should submit to the people the expediency of calling a Convention to revise or alter the Constitution in any specified part thereof, and the people should by the terms of their vote decide to call a Convention, the delegates would derive their whole authority and commission from such vote, and would have no right, under the same, to propose amendment in the part of the Constitution not specified.

Judge Morton in the Convention said, "If the people choose to adopt what we submit to them, it then becomes authority." Judge

Sprague, Henry Wilson, and all the other leading men of the Convention acquiesced in the view of Judge Morton. Fairly speaking, the opinions of the Judges of Massachusetts does not support the opinion of our Judges.

The Supreme Court of Pennsylvania in Woods' Appeal 75 Penn. It. 49, held that the calling of a Constitutional Convention was a legal exercise of power and so well settled that any attempt to disturb it would savor more of revolution than legitimacy. The Supreme Court of Alabama in Collier vs. Frierson, in 1854, 24 Ala. Rep. 100, say that the Constitution can be amended in but two ways, by the people who originally framed it, or in the mode prescribed by the instrument. Charles O'Connor, the eminent jurist, in a written opinion said, "I think that it is not maintainable by any fair reasoning that a State Constitution which provides for its own amendment, cannot be altered or varied in any other form."

In 1874 Governor Baxter of Arkansas, issued a proclamation convening the Legislature of the State, to meet on the 11th day of May, 1874. The Legislature at this special session passed an act submitting to the people the question of calling a Constitutional Convention, to form a new Constitution. The people voted to call a Convention. The Convention framed a new Constitution and submitted it to a vote of the people; a majority voted for its adoption and elected State and county officers and a Legislature. In the old Constitution there was no provision for calling a Constitutional Convention, but there was a provision for amending the Constitution. A select committee of the National House of Representatives was appointed on May 27th, 1874, to inquire, among other things, whether the State of Arkansas has now a government republican in form, the officers of which were duly elected. The case presented to the Committee involved the discussion of the very question now before us. One party in Arkansas claimed that the old Constitution could not be altered or amended in any mode except that provided in the Constitution, and the mode adopted was revolutionary and void.

The Committee reported, Judge Poland, Chairman: "If the question were new it would deserve great consideration. . . . But the Committee believe that the doctrine has by a long continued series of opposite precedents been entirely overthrown. It has been done from time to time for more than half a century, and by some of the very leading States in the Union. It continued to be doubted and debated for a long time, but was always acquiesced in, and in later years the regularity of making new Constitutions through the medium of Constitutional Conventions even where another method was provided in the old has hardly been brought into question."

"Mr. Jameson, in his recent work, in which he appears to have given great research and consideration to the subject, lays it down as now the accepted Constitutional law of the country, that when no mode of amendment is provided in a Constitution, or a specific mode not declared to be exclusive that it is perfectly regular and legitimate for the Legislature to inaugurate proceedings for a Convention by providing for submitting the question of calling one to the people."—43d Congress, 2d Session, Report 127.

In respect to the maxim *Expressio unius est exclusio alterius*, Lord Campbell said in Saunders vs. Evans, 8 H. L. Cas. 729, "it"—the maxim—" is not of universal application but depends upon the intention of the parties as discoverable upon the face of the instrument or of the transactions;" also Broom's Legal Maxims, 653, 7 Am. Ed. In the language of Willard, J., in Barto vs. Himrod, 4 Seld. N. Y. 483,—"The maxim is more applicable to deeds and contracts than to a Constitution and requires great caution in its application in all cases." See Williams vs. Mayor of Detroit, 2 Michigan, 563. Wells vs. Bain, 75, St. 40-46. In Eastern Archipelago Co. vs. The Queen, 2 Ellis & Blackburn, 878, Mr. Justice Williams observed, "This maxim of law is by no means of universal or conclusive application. For example, it is a familiar doctrine that though where a statute makes unlawful that which was lawful before and appoints a specific remedy that remedy must be pursued and no other. Yet where an offense was ante-

cedently punishable by a common law proceeding, or by indictment, and a statute prescribes a particular remedy in case of disobedience, that such particular remedy is cumulative and proceedings may be had either at common law or under the statutes." "In other words," says Mr. Jameson, sec. 574, "the maxim *Expressio unius* cannot be applied to exclude the call of conventions though not expressly authorized by the Constitution."

There is a difference between amending and revising a Constitution, and while it may be plausibly argued that the amendment must proceed according to the way pointed out by the Constitution, a revision may be made by means of a Constitutional Convention. The legislative method of amendment is confined to a narrow and defined purpose, and that by convention to a broader and more general and undefined purpose embracing within its scope the former and possibly much more. To say, then, that the purpose of the two modes is the same is to say that a part is equal to, or is the same as the whole. Jameson § 574, c.

"In the original States, and all others subsequently admitted, the power to amend or revise their Constitutions resides in the great body of the people as an organized body politic, who being vested with ultimate sovereignty and the source of all State authority, have power to control and alter at will the law which they have made. But the people in the legal sense must be understood to be those who by the existing Constitution, are clothed with political rights and who, while that instrument remains, will be the sole organ through which the will of the body politic can be expressed." Citing Luther vs. Borden, 7 Howard 1; Wells vs. Bain.

But the will of the people to this end can only be expressed . . . by the Constitution whose revision or amendment is sought, or by an act of the legislative department of the State." Cooley's Constitutional Limitations, p. 40.

Speaking of Jameson on Constitutional Conventions, Judge Cooley says,—Const. Limitations, p. 41.—This work is so complete and satisfactory in its treatment of the general subject as to leave little to be

said by one who shall afterwards attempt to cover the same grounds.

There is apparently a misunderstanding as to the views Webster held as to the legality of conventions called by legislative authority, without express Constitutional provisions, and where there were provisions in the Constitution for legislative amendments, to revise Constitutions. In his great argument before the Supreme Court of The United States in the case Luther vs. Borden, January 27th, 1848, he had occasion to refer to the action of the State of New York which, in 1845, had adopted a new Constitution. The old Constitution provided no way for calling a convention, but it contained a provision for amendment similar to our own. He had a rare opportunity to condemn the revolutionary character of the proceedings in New York; to hold them up to the abhorence and contempt of the American people. If Webster believed that the convention was illegally called and revolutionary in character, he would have done so. He did refer to the calling of the convention, and cited it as an authority to support his argument. These are his words: "one of the most recent laws for taking the will of the people in any State is the law of the State of New York. It begins by recommending to the people to assemble in their several election districts and proceed to vote for delegates to a convention. If you will take the pains to read that act it will be seen that New York regarded it as an ordinary exercise of legislative power. It applies all the penalties for fraudulent voting as in other elections. It punishes false oaths as in other cases. Certificates of the proper officers were to be held conclusive and the will of the people was in this respect collected essentially in the same manner, supervised by the same officers, under the same guards against force and fraud, collusion and misrepresentation as are usual in voting for State or United States officers.

We see, therefore, from the commencement of the Government under which we live down to the late act of the State of New York, one uniform current of law, of precedent and of practice, all going to establish the point that changes in Government are to be brought about by the will of the people, assembled under such legislative provisions

as may be necessary to ascertain that will truly and authentically." Webster's Great Speech, p. 542.

If Webster does not distinctly argue, and with weight, that the calling of a Constitutional Convention is not only a legal act but that it meets with his approval, and has become the settled law of the country, and is entitled to be known as the American method as distinguished from a lawless and revolutionary method, then the English language has changed its meaning since he spoke.

Before Webster made his argument in Luther vs. Borden case, the following named States had called Conventions. In their Constitutions there was no express provision for calling a Convention, but there was a provision for legislative amendment · Delaware, 1792 ; Missouri, 1845 ; New York, 1846 ; South Carolina, 1790. . . . . Since that time, Arkansas, 1874 ; Louisiana, 1852, 1879 ; Maryland, 1851 ; Massachusetts, 1853 ; Missouri, 1861, 1863, 1865 ; Tennessee, 1865 ; Texas, 1875 ; Pennsylvania, 1873. It would seem as though Webster's reasoning was deemed conclusive, and denied only in Rhode Island.

Chief Justice Durfee, p. 42, Thoughts on the Constitution, says: . . . . I do not mean to say that the General Assembly cannot call a Convention to prepare amendments or prepare them in the form of a new Constitution.

It has been argued by learned men, and apparently too without the slightest consciousness of its absurdity, that the legislatures which have called Constitutional Conventions where the Constitution provided for amendments in the legislative mode, but not by Convention, have violated their State Constitutions, and aided in effecting a revolution in the State Governments ; and that because other men have disregarded their oaths of office is no argument why the legislators of Rhode Island should disregard theirs. The argument while very convenient is far from convincing.

Still another argument, to show that the calling a Convention is prohibited by the Constitution, is boldly advanced. The Constitution contains provisions for its own preservation and continuance, but not

for its subversion or destruction. If it was intended that the Constitution should continue forever, well and good: if it was intended that radical changes could be made by amendments, the argument is without weight. Says Chief Justice Durfee, "An amendment in the form of a new Constitution can easily be . . . . proposed and approved by prefixing to it the words . . . . "

Those denying the power of the legislature to call a Convention will search in vain for authorities to support their position. The common and accepted practice of years, the numerous decisions of the courts; the opinions of the greatest Constitutional writers; and the common sense of the American people are all against them.

Some have claimed, notwithstanding that the authorities and precedents are in favor of the legality of submitting to the electors the question whether they desire to have a Convention called, that the authorities have no weight in Rhode Island. This view may be patriotic, and pleasing to some, but it would be strange indeed if Rhode Island differed from her sister States in construing organic and fundamental law. State feeling may beget State prejudice, and what was but mere sentiment may grow to be the handmaid of oppression. When we get into the domain of sentiment argument is useless.

Section one, article one of our State Constitution says: "In the words of the Father of his Country, we declare 'that the basis of our political systems is the right of the people to make and alter the Constitutions of our government, but that the Constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory on all.'" Section 23 reads: "The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people." It does seem as though the people retained the right to change the Constitution. Article 4, section 10. "The General Assembly shall continue to exercise the powers they have heretofore exercised unless prohibited in this Constitution." Prior to the adoption of the present Constitution the Assembly had called four Conventions; in 1824, 1834, 1841, 1842. The charter did

not confer that power upon them. In words, the Constitution does not prohibit the Assembly calling a Convention. In fact, the General Assembly in May and September, 1853, called two Conventions. It is passing strange that after the Assembly called six Conventions its power is denied.

III. Is it expedient to submit to the people whether they desire to have a Constitutional Convention called?

The Joint Special Committee of the Assembly, in their report of 1881, say:

"Two thousand one hundred and fifty-six persons, with four organized associations, have petitioned this General Assembly to call a constitutional convention; your committee are of the opinion that the General Assembly has no authority to call such convention; but, nevertheless, considering the number and standing of the petitioners, your committee, without reference to the opinions of the members of the committee as to the results which the petitioners desire to attain, have concluded that it was their duty to recommend to the General Assemby to propose to the electors of the State an amendment to the constitution, which they herewith submit, which amendment, if adopted by the people, will authorize the General Assembly to call a constitutional convention."

Since that time the numbers of the petitioners have increased every year. Their demands are reasonable. They desire to have the people pass on the question whether they want to hold a Convention or no. It cannot be denied that matters of importance to the welfare of the State are demanding a hearing. The abolition of the registry tax, the teeming mother of corruption; the extension of the suffrage to foreign-born citizens upon the same terms as to natives; the placing of registry voters of Providence upon an equality with the registry voters of Pawtucket and Newport, or *vice versa*, ought to be acted upon in Convention.

If the people refuse to hold a convention, no harm is done; if they vote to hold one a strong reason exists for calling it. If a majority of the people of Rhode Island are dissatisfied with the Constitution, it has outlived its usefulness. Every advance toward liberty has been retarded more or less by the dread of the fancied evils of disorder and ruin. Even old Sarum had its defenders. The framers of our Constitution, though able and learned men, wise and far-seeing, worthy of all veneration, had their limitations; wisdom did not die with them, nor was Constitutional liberty wounded in their death.

We recommend the passage of the accompanying bill.

GEORGE J. WEST,
HENRY G. TUCKER,
JOHN A. McQUADE.